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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1544

JOHN PATRICK MAHONEY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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TABLE OF CONTENTS

	Page
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AMENDMENT AND STATUTORY PROVISIONS INVOLVED	2
REASONS FOR GRANTING WRIT:	
1. Petitioner's Sentencing Should Not Be Effected or Tainted by Inquiries and Responses as to Plans to Seek Review.	4
2. The Court of Special Appeals Having Found Impropriety Enunciated a Rule for Protection of Constitutional Rights so Narrow as to Be Non-Existent	5
3. Declaring the Impropriety, the Court of Special Appeals' Denial of any Relief Is in Itself a Denial of Due Process of Law.	6
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:

North Carolina v. Pearce, 395 U.S. 711 (1969) 5, 6, 8a

Appendix:

A. Opinion of Court of Special Appeals of Maryland 1a

B. Order of Court of Appeals of Maryland, denying Certiorari ... 1b

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The Petitioner, John Patrick Mahoney, prays that a Writ of Certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland, denying Certiorari, entered January 10, 1972; and the judgment and Opinion of the Court of Special Appeals of Maryland, entered October 1, 1971.

OPINION BELOW

The Order of the Court of Appeals of Maryland, not yet officially reported, appearing the Appendix hereto. The Opinion of the Court of Special Appeals of Maryland, 13 Md. App. 105, also appearing in the Appendix hereto.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland was entered on October 1, 1971. The Order of the Court of Appeals of Maryland, denying Certiorari, was entered on January 10, 1972. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED

Whether a Trial Court's inquiry into a criminal defendant's plans for appeal immediately prior to sentencing, creates such an apprehension of retaliatory motivation on the part of the sentencing judge as to unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his conviction.

CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the Constitution of the United States

Fourteenth Amendment to the Constitution of the United States

STATEMENT OF THE CASE

On the night of October 16, 1969, in Silver Spring, Montgomery County, Maryland, Ronald Lee Dorsey, while escorting a departing guest to a main road, saw a large green van parked in his driveway. He later saw the truck parked with

its lights off, near a construction site, took the license number, saw two men run away from the truck, and then pulled alongside and asked what was going on. In response, the driver, who Dorsey identified as the Petitioner, spoke indiscernibly. Dorsey drove around the truck to the home of Mr. and Mrs. Handback, where he sought a phone to call the police to explain his suspicions about the truck.

The truck approached Dorsey while he asked the Handbacks about a phone. Several figures were seen in the truck. Shouts came from the truck. Shots were fired from the truck. Dorsey fled to his own truck, and as he entered to drive off, he testified one or two bullets struck his tailgate. The green truck was approximately one hundred yards from Dorsey's truck when the shots were fired.

The license number reported to the police proved to be that of a green van owned jointly by the Petitioner, John Patrick Mahoney, and Charles B. Nolker. On October 26 and October 27, 1970, the Petitioner was tried before a jury in the Circuit Court for Montgomery County, Maryland, on the charge of assault with intent to murder, and the Petitioner was found guilty of the aforenamed offense.

Subsequent to the trial, on December 16, 1970, the Trial Court called the Petitioner, his attorney, a representative of the State's Attorney's office, and a court reporter into his chambers. At that time, the Trial Judge conducted a broad ranging inquiry into the Petitioner's past encounters with the law, drinking habits, and military history. The Trial Judge also asked the Petitioner if he had noted an appeal or whether or not it was intention to file an appeal. At this point, defense counsel attempted to intervene, but the Trial Judge informed counsel that he would only be heard later in the court room. The situation occurred as follows. After stating that he was certain of the Petitioner's guilt (TR 15-16), the Judge asked, "Has any appeal been filed in this case?" Defense counsel tried to interject, but the Judge cut him off with an amended question, "Do you con-

template filing an appeal or noting an appeal? Do you wish to?" (TR 16). Petitioner answered, "Yes." Counsel again sought to interject and was told by the Judge, "I will hear from you upstairs in the court room." The Judge thereafter adjourned the in-chamber conference and proceeded to the court room, where he imposed upon the Petitioner a sentence of ten years imprisonment, with the sixth through tenth years suspended.

The Petitioner appealed the Trial Court's judgment alleging, inter alia that the sentencing procedure denied the Petitioner's rights under the Constitution of the United States. On October 1, 1971, the Opinion of the Court of Special Appeals of Maryland was filed, affirming the Trial Court's judgment.

The Petitioner in a timely fashion sought a Writ of Certiorari in the Court of Appeals of Maryland. The Petitioner's request was denied on January 10, 1972. Upon the Court of Appeals' denial of Certiorari, the Petitioner seeks a Writ of Certiorari of this Court to review the judgment of the Court of Special Appeals.

REASONS FOR GRANTING WRIT

1. The Petitioner, suggested below, and concedes here that a Trial Judge is entitled to make wide ranging inquiries into a convicted defendant's character. The investigation of the character traits and social problems is a necessary prerequisite to a proper sentencing, a sentencing which will most likely be a beneficial and rehabilitating influence on the defendant.

Notwithstanding the Trial Court's need and right to investigate a defendant's character, the Trial Court is not concerned with the defendant's right to appeal or whether or not it will be exercised. In the present case, the Trial Court enunciated its personal belief in the defendant's guilt, then inquired if the defendant would seek an appeal, prevented the interjection of counsel, and adjourned the pro-

ceedings upon receiving an affirmative reply. The Court immediately reconvened in open court and sentenced the Petitioner to ten years' imprisonment with the sixth through tenth years suspended.

This Court in *North Carolina v. Pearce*, 395 U.S. 711, (1969), Justice Stewart writing the Opinion for the majority, has expressed the concern over deterance of Constitutional rights. The decision declares:

> "Due Process of Law, then, requires that vindictiveness against a defendant for attacking his first conviction must play no part in the sentence he received after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such retaliatory motivation on the part of the sentencing judge." 395 U.S. 711, at 725 (1969)

The present case clearly falls within the *Pearce*, supra, prohibition. The sentencing judge, upon learning of the Petitioner's intent to appeal, adjourned the conference, proceeded to the court room and imposed sentence on the Petitioner of ten years' imprisonment with the sixth through tenth years suspended.

2. The Court of Special Appeals of Maryland specifically condemned the sentencing procedure utilized but refused the Petitioner's request for resentencing. The Court held:

> "We think the sentencing procedure utilized in this case does not fall within the exceptions stated herein. It is improper for a trial judge to inquire prior to imposition of sentence as to whether or not a defendant contemplates filing an appeal, because such an inquiry gives rise to an inference that the severity of the sentence is to be measured by the response of the defendant. Such an inquiry is not relevant to the sentencing."

The Court of Special Appeals went on to state:

> "However, the sentence imposed in this case was well within the limits of the statute, and we cannot say, on the bare record before us, that it was motivated by passion, ill-will, prejudice, or some other unworthy motive. Nor can we say that it was "vindictive" as a result of the appellant's response to the trial judge's inquiry relative to an appeal."

What in effect has been established is that the inference created by the improper question is rebutted as long as the trial judge does not specifically announce that he is motivated by an unworthy motive. A trial judge is not going to announce in the record that he is motivated by ill will, prejudice or passion. If a defendant is to be protected from the deterance of the exercise of his Constitutional rights, protection must not depend upon the judge's announcement of his own misconduct.

The right to appeal is guaranteed to defendants in Maryland criminal courts. If the guarantee of Constitutional rights and the prohibition against their infringement are to have a practical effect, this Court's decision in *Pearce*, supra, must be given an effective means of enforcement. The Maryland test established in this case so limits the protected area as to make the Constitutional right nonexistent.

3. The Petitioner maintains here as he maintained below that the sentencing judge's procedure was improper, prejudicial and unconstitutional. The Court of Special Appeals having declared the impropriety of the sentencing procedure, denied any relief. When a court has found an impropriety of Constitutional proportions, the denial of adequate relief denies Due Process as much as the original impropriety.

The denial of relief by the Court of Special Appeals of Maryland is believed to be erroneous. The Petitioner believes that a decision by this Court is necessary to establish the rights of a defendant intending to seek review.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Opinion and denial of relief of the Court of Special Appeals of Maryland.

Respectfully submitted,

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APPENDIX A

REPORTED

IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 30

September Term, 1971

JOHN PATRICK MAHONEY

v.

STATE OF MARYLAND

Thompson
Moylan
Gilbert,
JJ.

Opinion by Gilbert, J.

Filed: October 1, 1971

John Patrick Mahoney was convicted of assault with intent to murder by a jury in the Circuit Court for Montgomery County. He was sentenced to a term of ten years, the last five years of which were suspended conditionally.

Ronald Lee Dorsey testified that on the evening of October 16, 1969, as he was leaving his residence, he

noticed a van type truck which aroused his suspicions. He returned to the area of his home about 10 to 15 minutes later and again observed the parked vehicle. He wrote down the license number and asked the driver [later identified as appellant] what was going on. Two persons jumped from the van and ran. Dorsey then drove to a neighbor's house, which was a short distance up the street, in order to call the police. While he was talking to Mr. and Mrs. Handback, the neighbors, the same van came by and shots were fired in the direction of Dorsey. Two bullets hit the tailgate of Dorsey's pickup beside which he was standing. Dorsey jumped into the pickup and fled. Mr. and Mrs. Handback ran into their house. Dorsey was positive that the person he saw driving the van, when he first inquired as to what was going on, was the appellant. Dorsey said that the appellant stuck his head out of the door of the truck and that his [Dorsey's] headlights were shining on the appellant. Dorsey testified that the shots were coming from the driver's side of the van, but Mrs. Handback thought that the shots came from the passenger side of the vehicle.

The van was registered to the appellant and another. Appellant denied involvement and claimed that the van had been stolen. It was reported stolen to the police on the morning of October 17, 1969, at 9:05 a.m. Apparently it was recovered shortly thereafter. Appellant asserted that the vehicle was stolen some time between 6:30 p.m. on the 16th, and 8:30 a.m. on the 17th of October. He further said that it had been hot-wired.

Appellant produced a number of witnesses who testified that appellant, in company with the other owner of the van, was in Odenton, Maryland, at the time of the shooting and was there until the bars closed at 2:00 a.m.

Detective Marvin Gulick of the Montgomery County Police Department, investigated the incident, and at his request appellant went to police headquarters. At that

time the appellant had on his person a Virginia fishing license, which stated a false residence.

Approximately 45 days after the trial, the trial judge had the appellant, his attorney, a representative of the State's Attorney's Office, and a court reporter brought into his chambers, where he conducted a broad examination into the appellant's personal and marital situation, the number of children, job, salary and prior convictions, as well as a charge upon which he had not been convicted. The court then inquired as to whether an appeal had been filed or whether one was contemplated. The latter question was answered in the affirmative.

On appeal, the appellant raises three questions.

1. The admissibility of certain evidence.
2. The sufficiency of the evidence.
3. The sentencing procedure.

I

ADMISSIBILITY OF CERTAIN EVIDENCE

The first witness produced by the defense was Detective Gulick, who was asked, relative to the conversation he had with appellant in the police station, "What did you say to him, and what did he say to you?" The sergeant gave a lengthy answer, during the course of which he said, "I then questioned him about a fishing license." Counsel interrupted with another question, and the examination of the sergeant continued.

On cross-examination, the Deputy State's Attorney asked the question, "Where was that fishing license from?" Appellant objected on the ground that the question was beyond the scope of the examination, and irrelevant. The trial judge overruled the objection, and the witness was allowed to answer. The witness then answered the question, stating that the license showed a home address of "I believe some place in the Fort Belvoir, Virginia area, a resi-

dent fishing license." When asked, "What state, of the State of Maryland?" the witness answered, "Virginia." He then continued with a discourse during which he related to the jury how the appellant had lied about his address in order to obtain a cheaper rate, and that non-residency fees were higher than residency fees. No objection was made by the appellant to the non-responsive dialogue, nor was there a motion made to strike the answer.

Here, appellant contends that the testimony should not have been allowed. We think otherwise. In the appellant's initial examination of Detective Gulick, he had asked what was said by the appellant to the detective, and, among other things, in the response was the matter of the fishing license. We cannot find the answer to the State's question, "Where was that fishing license from?" to be harmful to the appellant because the question asked only the name of the state and not if the license was a resident or non-resident one. It was the voluntary non-responsive dialogue to which no objection and no motion to strike were made that brought in the matter of the resident license being obtained by the supplying of a fictitious address. The question is not properly before us inasmuch as the appellant did not preserve it by appropriate action. Rule 1085.

Appellant next argues under the admissibility of evidence that the State was allowed to recall, over objection, the last defense witness, Charles E. Nolker, who had been subjected to cross-examination. The appellant relies upon the case of *Deibert v. State*, 150 Md. 687, 693 (1926). We think appellant misinterprets *Deibert*. The Court of Appeals in that case upheld the right of a trial judge to refuse to allow the defense to recall a State's witness, saying that the same was in the discretion of the trial court. It did not say it was impermissible to recall a witness.

When the witness, Nolker, was recalled, he testified that one of the defense witnesses, a Mrs. Lewis, had been taken to her home at approximately 2:00 a.m. on October 17, contrary to the appellant's testimony that she had been left

standing in front of the bar. Neither the appellant nor the State asked Mrs. Lewis that specific question.

We have held that the action of the trial court in permitting the recall of a witness to the stand is entirely within its sound discretion, and that this Court would not interfere with that discretion unless there is a clear abuse which results in prejudice to the accused. *Turner v. State*, 7 Md. App. 74, 78 (1969), *Gardner v. State*, 8 Md. App. 694, 699 (1970), *Winegan v. State*, 10 Md. App. 196, 203 (1970). While we think that the question could have been properly elicited in cross-examination of the witness, Nolker, we find no abuse of discretion on the part of the trial judge in allowing the recall of the witness by the State as part of its rebuttal.

II

SUFFICIENCY OF THE EVIDENCE

Appellant argues that the evidence did not prove him guilty of the charge of assault with intent to murder. He urges us to overrule our holding in *Wells v. State*, 8 Md. App. 510, 521 (1970), that a specific intent to kill is not a necessary element for conviction of assault with intent to murder. We decline to do so. Evidence showing that a deadly weapon such as a gun was pointed toward a human being and discharged in the general direction of that human being in a random fashion is sufficient to support inferences of both malice and intent to do grievous bodily harm. In Clark and Marshall, *Crimes*, 7th Ed., § 5.03, it is stated:

> "If a person deliberately, and without ignorance of fact, shoots in the direction of another, it will be presumed that he intended to kill him, and he may be convicted of murder, or assault with intent to murder, according to the result."

The intentional use of a deadly weapon in a deadly manner may give rise to inferences of intent to kill and premeditation. 1 Wharton, *Criminal Evidence*, 12th Ed., § 131.

We are not persuaded by appellant that *Williams v. State*, 9 Md. App. 447 (1970), wherein we reversed a judgment of assault with intent to murder, requires us to act similarly here. In *Williams*, the prosecuting witness had entered his automobile when he was shot and did not see who shot him, nor did he know why Williams would have shot him. The prosecuting witness was, however, shot from the window of a house, and all he saw was a flash. He had been in the house prior to the time he was shot, and two other people, Williams and Barbara, were also there. Williams testified that Barbara had done the shooting; he had actually seen her with a gun in her hand, and that Barbara had told him she did the shooting. We reversed because the evidence did not show beyond a reasonable doubt that Williams was the criminal agent, nor was there any evidence adduced to show that the appellant Williams was in the room from which the shot was fired. The prosecuting witness had testified that Williams was not in that room when the witness was in the house visiting Barbara. Here, appellant was placed in the van by Dorsey who actually spoke to him and specifically identified him. Shots were fired from the vehicle in the general direction of Dorsey and struck the pickup truck beside which he was standing. Dorsey testified that the shots came from the driver's side of the van, a position in which he had earlier placed appellant. The presence of other persons was not established. The crime of assault with intent to murder embodies the element of malice leading to a charge of murder if death should ensue. *Marks v. State*, 230 Md. 108, 112 (1962). The test for assault with intent to murder is that the crime would be either murder in the first or second degree if the victim dies. The Court of Appeals said in *Tate v. State*, 236 Md. 312, 317 (1964):

> "The essential distinction between murder and manslaughter is the presence or absence of malice, which is the intentional doing of a wrongful act to another without legal excuse or justification. The inference of malice may be drawn from the fact of the use of

a deadly weapon directed at a vital part of the body. *Chisley v. State*, 202 Md. 87, 95 A.2d 577. The law presumes that in the absense of justification, excuse or some circumstances of mitigation, all homicides are committed with malice and constitute murder. This presumption also applies to cases of assault with intent to commit murder." See also *Cook v. State*, 9 Md. App. 214, 218 (1970), *Lindsay v. State*, 8 Md. App. 100, 104 (1969), *Perez v. State*, 7 Md. 452, 454 (1969).

We think there was legally sufficient evidence from which the jury could properly conclude that the crime of assault with intent to commit murder had been committed, and that the appellant had committed it.

III

SENTENCING PROCEDURE

At the sentencing proceedings the trial judge, as we have noted herein, conducted a wide-range inquiry into the appellant's life. The judge stated that he was certain of the appellant's guilt and then asked, "Has any appeal been filed in this case?" Counsel stated, "You can't file an appeal–."[1] Whereupon the court asked, "Do you contemplate filing an appeal? –Do you wish to?" The answer was, "Yes." Counsel then informed the court, "Your Honor, we haven't discussed this and any appeal would be noted after sentencing." The court then continued its inquiry into the appellant's habits and then dispatched the parties to the courtroom, where, after argument of counsel, sentence was pronounced.

Appellant argues that while the trial judge may, within his broad discretion, consider information concerning a defendant's reputation, prior record, general health, morals, mentality and social background in determining the type of

[1] We assume that counsel was about to correctly state the law that no appeal lies until there is a final judgment.

sentence which should be imposed [see *Driver v. State*, 201 Md. 25, 31-32 (1952), *Skinker v. State*, 239 Md. 234, 237 (1965), *Gee v. State*, 2 Md. App. 61, 68 (1967), *Smith v. State*, 5 Md. App. 633, 638 (1969)] he should not be allowed to inquire as to whether or not a defendant intends or contemplates the filing of an appeal.

We have held that the matter of sentencing within the limits of the law is peculiar to the trial judge and will not be reviewed by this Court unless dictated by passion, prejudice, ill-will, or other unworthy motive. See *Johnson v. State*, 9 Md. App. 37, 39 (1970), *Minor v. State*, 6 Md. App. 82 (1969), *Gee v. State, supra*.

We think the sentencing procedure utilized in this case does not fall within the exceptions stated herein. It is improper for a trial judge to inquire prior to imposition of sentence as to whether or not a defendant contemplates filing an appeal, because such an inquiry gives rise to an inference that the severity of the sentence is to be measured by the response of the defendant. Such a query is not relevant to the sentencing. In *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), the Supreme Court said:

> "Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.

It logically follows that if the courts are prohibited from exercising vindictiveness on a retrial because of a defendant's successful appellate attack, they are likewise prohibited from exercising vindictiveness because of a defendant's intention to appeal. However, the sentence imposed in this case was well within the limits of the statute, and we cannot say, on the bare record before us, that it was motivated by passion, ill-will, prejudice, or some other unworthy motive. Nor can we say that it was "vindictive" as a result of the appellant's response to the trial judge's inquiry relative to an appeal. The better practice is that the judge, before imposing sentence, not inquire as to a

defendant's intentions regarding an appeal. A defendant in a criminal case has conferred upon him by Article 5, §§ 12 and 12(a) of the Maryland Code, the right to appeal any conviction.

JUDGMENT AFFIRMED.
COSTS TO BE PAID BY THE APPELLANT

APPENDIX B

JOHN PATRICK MAHONEY *

V. *

STATE OF MARYLAND *

IN THE

COURT OF APPEALS
of
MARYLAND

Miscellaneous Docket No. 291 (Criminal)

September Term, 1971

(No. 30, September Term, 1971
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ Hall Hammond

Chief Judge

Date: January 10, 1972.